BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

AMBER D. DINORA	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,061,299
DOLLAR GENERAL #2484	)	
Respondent	)	
AND	)	
	)	
DG RETAIL, LLC	)	
Insurance Carrier	)	

ORDER

Respondent requested review of the April 16, 2013, Award by Administrative Law Judge (ALJ) Thomas Klein. The Board heard oral argument on August 23, 2013, in Wichita, Kansas.

APPEARANCES

Mitchell W. Rice, of Hutchinson, Kansas, appeared for the claimant. Kevin M. Johnson, of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ found the opinions of Dr. Do and Dr. Brown to be credible and "balanced" the two to find claimant suffered a 12.5 percent impairment to the body as a whole. Based on Dr. Brown's testimony, the ALJ found that the claimant is in need of ongoing pain management and authorized Dr. Sollo for that purpose. The court further found that the claimant is likely to need future medical treatment based on the testimony of Dr. Brown.

Respondent argues that compensation should be denied as claimant was simply changing positions, which is an act of daily living and constitutes a neutral risk.

Claimant relied on the submission letter submitted to the ALJ, which supports the argument that she is entitled to a 20 percent whole person impairment and pain management as recommended by Dr. Brown.

The issues on appeal are:

1. Did claimant met with personal injury by accident arising out of and in the course of her employment with respondent?

2. Did the alleged accidental injury arise as a result of an activity of day to day living or a neutral risk so as to deny claimant compensation?

3. Was claimant's alleged accidental injury at work the prevailing factor giving rise to any need for treatment and/or permanent disability?

4. What is the nature and extent of claimant's injury and/or disability?

FINDINGS OF FACT

Claimant began working for respondent in late March 2011, as third key associate manager, earning $8.25 an hour. On June 30, 2011, claimant injured her low back after her back popped while she stood up. Claimant put her left and right hands on her left knee to support herself as she was standing. As claimant was attempting to stand up, her back popped and claimant was unable to stand up all the way. Claimant testified that she had been on her knees zoning shelves (pulling items to the front of the shelf) prior to the onset of pain.

Claimant immediately reported the incident to her manager, Adam Veldez, who instructed her to call the nurse hotline, providing her with the number. Claimant called the nurse hotline and was told that she probably had a strain in her lower back and needed to put something cold on it. Claimant found something cold to compress on her back, and then proceeded to the registers to make change for an employee. Claimant testified that as she pivoted, she felt pain shooting from her left lower back to her right shoulder blade. She screamed and dropped to her knees. She was asked if 911 needed to be called. She responded that she couldn't leave unless another manager was present. Claimant proceeded to the Hutchinson Hospital emergency room (ER) after her boss, Adam, arrived to relieve her.

Claimant denied any prior back problems, but acknowledged prior neck problems. She received treatment including pain medication and was ultimately referred to board

certified orthopedic surgeon Pat D. Do, M.D., who prescribed physical therapy and cortisone injections.

Claimant testified that sitting for 30 minutes to an hour aggravates her pain and walking for 30 minutes to an hour also aggravates her pain. Claimant alternates her activities in order to relieve her pain. She testified that her pain is pretty much the same as when she went for treatment, except she can now walk.

Claimant's last day of work for respondent was September 21, 2011. She was terminated for having a $3 shortage in her register. Claimant believes that she was terminated because she was not able to fulfill her normal duties as a manager, which was causing a problem around work. She believes that the register shortage was just an excuse to terminate her. However, claimant later admitted that she had actually been involved in three incidents involving shortages, one at the cash register and two involving deposits.

Claimant testified that she spoke with Adam about her inability to do her job before she was fired and while she was under restrictions from Dr. Do. Claimant testified that because of her restrictions she was not able to climb ladders, push anything, or bend down. Claimant has looked for work since she was fired and had one offer from the Kwik Shop. But, after a background check, the offer was rescinded. Claimant began receiving unemployment benefits in October 2011. At the time of the regular hearing, claimant was watching her sister's three children, ages six, four and two.

Claimant initially denied any prior low back problems. However, on cross-examination, she admitted to injuring herself during her employment with McDonald's in 2010. She could not say whether the injury was on June 21, 2010, or in September 2010. A medical record from Prairie Star Health Center dated June 21, 2010, indicates multiple health concerns, including unexplained fatigue, weakness, change in vision, headaches, muscle/joint pain, and recent back pain. No additional explanation is provided in this record. Claimant also suffered an injury to her neck on September 24, 2010, when a five pound sack of sugar fell on her head while working at McDonald's.

A September 12, 2011, note from Preferred Physical Therapy, indicated claimant was working at a fair for 10 hours on Saturday and by Sunday she was hurting so bad she could hardly move. She indicated that at best, her pain was a 4 out of 10 and at worst an 8 out of 10. Claimant testified that she had not been working at the fair and had never worked at the fair. However, respondent's Exhibit # 3 to the regular hearing contains multiple entries on Facebook, with claimant's name and picture and a description of her long hours of work at a jewelry counter at the fair. Claimant ultimately admitted that she actually worked a total of 10 days at the fair.

Claimant first met with Dr. Do, on July 5, 2011, for an evaluation of her low back pain. The history provided to Dr. Do indicated claimant bent over while stocking shelves

and felt a pop and had pain in her back. Claimant then stood up and felt pain with further bending. The next time claimant bent down, she "locked" up.

Claimant reported that her pain radiates over her right side and up to her mid back, and for a time radiated down into her right buttock. Dr. Do diagnosed low back pain and bilateral spondylolysis at L5 with grade I anterolisthesis of L5 on S1. Treatment options were discussed and an MRI and physical therapy for core strengthening were ordered. Dr. Do also felt claimant would benefit from a back brace. Dr. Do assigned restrictions of no lifting over 20 pounds, occasionally 20 pounds and frequently 10 pounds; no pushing or pulling over 50 pounds, occasionally 50 pounds and frequently 25 pounds; no bending more than 90 degrees; occasionally twist and turn; and no ladder climbing.

Dr. Do met with claimant again on August 19, 2011, at which time claimant's pain showed little change despite the use of a back brace. Claimant was uncomfortable with position changes and getting on and off the exam table, and she had tenderness on the left side of the lumbar region and palpable and tender spasms with active tender trigger points, more on the left. Dr. Do diagnosed low back pain, degenerative disc disease with posterior bulge and bilateral spondylolysis at L5 with grade I anterolisthesis of L5 on S1. Dr. Do again discussed treatment options with claimant and a corticosteroid injection was administered into the left lumbar trigger points. He opined that the degenerative disc disease and the spondylolysis likely preexisted the work event.

On September 23, 2011, claimant presented with some improvement of her low back pain with the use of a TENS unit. Claimant reported that sitting for more than 30 minutes increased her pain considerably and riding in the car made it even worse. With the little relief obtained following trigger point injections beginning to wear off, claimant chose to repeat the trigger point injections rather than receive an epidural injection or surgery. Dr. Do again diagnosed low back pain; degenerative disc disease with posterior bulge; and bilateral spondylolysis at L5 with grade I anterolisthesis of L5 on S1. Claimant was given another injection. Dr. Do assigned restrictions of no lifting over 20 pounds, occasionally, 10 pounds frequently, no pushing or pulling over 50 pounds occasionally and 25 pounds frequently, with no bending more than 90 degrees, only occasionally twisting and turning and no ladder climbing.

On November 3, 2011, claimant reported gradual improvement with her pain being centralized to the mid-lumbar regions. She continued to have fatigue with activity, but tolerated day-to-day activity. Dr. Do again diagnosed low back pain; degenerative disc disease with posterior bulge; and bilateral spondylolysis at L5 with grade I anterolisthesis of L5 on S1. Claimant chose to continue with conservative treatment.

On January 5, 2012, Dr. Do assigned restrictions of no lifting over 50 pounds, occasionally, 20 pounds frequently and 10 pounds continuously, with occasional bending limited to 90 degrees.

Claimant was found to be at maximum medical improvement on March 1, 2012, and was allowed to return to work with no limitations. On March 13, 2012, Dr. Do assigned claimant a 20 percent whole person impairment for loss of motion segment integrity associated with the low back pain, degenerative disc disease with posterior bulge and bilateral spondylolysis at L5 with grade I anterolisthesis of L5 on S1.

On December 12, 2012, respondent counsel provided a letter to Dr. Do with an enclosed discovery deposition transcript. The transcript was provided for the doctor to review regarding claimant's deposition description of the accident. The description was similar to claimant's testimony at the regular hearing, but not similar to the information provided to Dr. Do at the first examination on July 5, 2011. In response to respondent counsel's December 12, 2012, letter, Dr. Do opined that if claimant's testimony about the accident was true, then the injury she described in the deposition testimony would not be the cause for the provided treatment for her back injury. Additionally, the accident would not be the prevailing factor in claimant's need for medical treatment and would not have caused any permanent impairment. When explained the actual mechanics of claimant's self-described accident, he refused to change his present testimony regarding both causation and prevailing factor.

At the request of her attorney, claimant met with board certified orthopedic surgeon C. Reiff Brown, M.D., for an examination on April 13, 2012. She complained of constant low back pain that was intolerable with bending, lifting, prolonged standing and walking. She reported being unable to stand or walk for more than 15 minutes. She reported some relief from the use of a TENS unit, and denied any prior difficulty with her back. Dr. Brown described his understanding of the mechanics of the accident as having claimant bent over to reach a lower shelf, taking a box and then trying to come up straight, to a standing position.[1] It was his understanding that claimant had her arms around and was lifting a box at the time.[2]

Dr. Brown opined that claimant suffered a significant injury to the L5 and S1 lumbar areas of the spine. He found claimant with ongoing pain in the low back, but did not feel any additional conservative treatment would be helpful. Claimant deferred the option of surgery until a later date. Dr. Brown opined there was a causal connection between the conditions under which claimant's heavy work and repeated bending was required to be performed and the resulting accident. He also opined that the accident is the prevailing factor causing claimant's injury, present medical condition and resulting impairment of 5 percent permanent partial impairment of function to the body as a whole.

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[1] Brown Depo. at 13.

[2] Brown Depo. at 14.

Based on the presence of an L5 spondylolisthesis and early degenerative disc disease at L5-S1, Dr. Brown opined that someone with preexisting spondylolisthesis would be predisposed to severe muscle spasms while doing routine activities. He felt that this is what happened with claimant. Dr. Brown recommended claimant permanently avoid work that involves lifting above 25 pounds occasionally and 15 pounds frequently. He also recommended she avoid work that involves frequent flexion and rotation of the lumbar spine greater than 30 degrees. Claimant reported being unable to lift more than a few pounds or be on her feet more than a few minutes at a time without having a marked increase in severity of her back pain. He also recommend claimant alternate sitting, standing and walking short distances. Dr. Brown wrote that these restrictions are based on the recommendation that claimant return to work at a light duty level of work and gradually increase her activities.

In May 2012, after reviewing Dr. Do's March 13, 2012, progress note, Dr. Brown increased claimant's permanent partial impairment to 20 percent. In August 2012, he wrote that claimant would benefit from a pain management approach and recommended she meet with Dr. David Sollo.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2011 Supp. 44-501b(b)(c) states:

> (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508(d) states:

> (d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

K.S.A. 2011 Supp. 44-508(f)(1)(2)(B) states:

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.
(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.
(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:
(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;
(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and
(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.
(B) An injury by accident shall be deemed to arise out of employment only if:
(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

K.S.A. 2011 Supp. 44-508(f)(3)(A) states:

(3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:
(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;
(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;
(iii) accident or injury which arose out of a risk personal to the worker; or
(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

K.S.A. 2011 Supp. 44-508(g)(h) states:

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.
(h) "Burden of proof " means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

Respondent raises several defenses to claimant's entitlement to compensation. The first question is whether this is an activity of daily living, a risk personal to claimant, a neutral risk associated with claimant only or whether the incident at work was the prevailing factor leading to claimant's injuries and disability. The medical evidence from both Dr. Do and Dr. Brown identifies claimant's medical conditions of degenerative disc disease and spondylolysis as being preexisting. A dispute centers around whether claimant's accident significantly aggravated those conditions. Dr. Brown found the accident to be the prevailing factor leading to claimant's injury, present need for medical treatment and the resulting impairment of 5 percent to the whole person.

Dr. Do originally agreed with Dr. Brown's assessment, but changed his opinion when provided with claimant's testimony describing how the accident actually occurred. The actual description of the incident led Dr. Do to determine that claimant's accident would not be the prevailing factor in claimant's need for medical treatment and would not have caused any permanent impairment.

The Board finds the opinion of Dr. Do to be more persuasive. Claimant was involved in an incident at work which involved little trauma to claimant's body. The act of standing up while using both hands on her left knee may have made claimant's degenerative disc disease and spondylolysis become symptomatic. But, an injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

The law in this regard has changed significantly in recent years. The Kansas Supreme Court addressed the question when considering the pre-2011 Workers Compensation Act (Act) in *Bryant*.[3] The claimant in *Bryant* originally suffered a work related injury in 1997 when he jumped from a boat onto a dock. He underwent a lumbar spine diskectomy in 1998 with some benefit. However, he continued to experience ongoing low back pain. He then went to work for the respondent, Midwest in 2001, where he missed several work days due to persistent low back pain. On March 2, 2003, while on a service call, *Bryant* stooped to grab a tool out of his tool bag, and when he twisted back to work, he felt a "pop" or "snap" in his back. Later, on May 13, 2003, while working on an air conditioning system, he stooped or leaned over to weld something and felt an explosive increase in pain. He again underwent surgery, returning to work with restrictions, reduced hours and reduced pay. He quit that job to go to other employment which promised more hours, advancement and training, resigning from that job when the promised benefits failed to materialize.

An award for a permanent partial general (work) disability was granted by the ALJ and the Board but reversed by the Kansas Court of Appeals. The Court of Appeals held that the injuries were the result of the "normal activities of daily living." The Supreme Court

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[3] *Bryant v. Midwest Staff Solutions, Inc.*, 292 Kan. 585, 257 P.3d 255 (2011).

reversed the Court of Appeals, finding the injuries to have resulted from work related activities. The Court went on to note that an accidental injury is compensable if it only aggravates or accelerates an existing disease or intensifies the condition. The Court noted the change in the Act by the Kansas legislature, effective May 15, 2011, but held the old law applied to *Bryant*.

The May 15, 2011, version of the Act treats aggravations and accelerations differently from the applicable *Bryant* law. The law associated with this accident places stringent restrictions on a workers ability to obtain benefits when aggravating a preexisting condition. Here, Dr. Do did not find the accident created a permanent worsening of claimant's preexisting conditions. Even Dr. Brown agreed claimant's preexisting conditions heightened the risk associated with a possible injury while at work.

The Board finds claimant's accident on June 13, 2011, may have aggravated, accelerated or exacerbated her preexisting conditions. But, there was no permanent impairment generated from this accident. The mere aggravation of a preexisting condition no longer allows for an award of benefits. The accident must also be the prevailing factor causing the injury, medical condition, and resulting disability or impairment. Dr. Do opined claimant's need for ongoing medical treatment stems from her preexisting conditions and not from the accident. The Board finds Dr. Do's opinion the most persuasive in this record. The award of benefits by the ALJ is reversed.

The ALJ approved the fee agreement between claimant and his attorney. This file contains no attorney fee agreement between claimant and her current attorney as mandated by K.S.A. 44-536(b). As such, there can be no approval of that fee agreement. Should claimant's counsel desire a fee be approved, he/she must file and submit this written contract to the ALJ for approval.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be reversed. Claimant has failed to prove her accident on June 13, 2011, was the prevailing factor leading to her injury, medical condition and resulting disability or impairment. Also, the award of the ALJ is reversed with regard to the approval of a fee agreement between claimant and her current attorney, as above noted.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Thomas Klein dated April 16, 2013, is reversed.

IT IS SO ORDERED.

Dated this _____ day of September, 2013.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
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